

MITCHEL LEE JOSEPH, )  
 )  
Appellant, )  
 )  
v. ) Court of Appeals No. A-13520  
 )  
STATE OF ALASKA, )  
 )  
Appellee. )  
 )  
\_\_\_\_\_)  
Trial Court No. 4TO-18-00068 CR

APPELLANT'S OPENING BRIEF

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Deputy Clerk

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513.5, that the font used in the body and footnotes of this document is Century Schoolbook 13 point.

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## **AUTHORITIES RELIED UPON**

### **Alaska Constitution, article I, section 7 - Due Process.**

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

### **Alaska Constitution, article I, section 11 - Rights of Accused.**

In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

### **United States Constitution, amendment V.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **United States Constitution, amendment VI.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

### **United States Constitution, amendment XIV.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**AS 28.35.030. Operating a vehicle, aircraft, or watercraft while under the influence of an alcoholic beverage, inhalant, or controlled substance.**

(a) A person commits the crime of driving while under the influence of an alcoholic beverage, inhalant, or controlled substance if the person operates or drives a motor vehicle or operates an aircraft or a watercraft

(1) while under the influence of an alcoholic beverage, intoxicating liquor, inhalant, or any controlled substance, singly or in combination; or

(2) and if, as determined by a chemical test taken within four hours after the alleged operating or driving, there is 0.08 percent or more by weight of alcohol in the person's blood or 80 milligrams or more of alcohol per 100 milliliters of blood, or if there is 0.08 grams or more of alcohol per 210 liters of the person's breath.

...

(n) A person is guilty of a class C felony if the person is convicted under (a) of this section and either has been previously convicted two or more times since January 1, 1996, and within the 10 years preceding the date of the present offense, or punishment under this subsection or under AS 28.35.032(p) was previously imposed within the last 10 years. For purposes of determining minimum sentences based on previous convictions, the provisions of (w)(4) of this section apply. Upon conviction, the court

**AS 28.35.032. Refusal to submit to chemical test.**

(a) If a person under arrest for operating a motor vehicle or aircraft while under the influence of an alcoholic beverage, inhalant, or controlled substance refuses the request of a law enforcement officer to submit to a chemical test authorized under AS 28.33.031(a)(1) or AS 28.35.031(a), or if a person involved in a motor vehicle accident that causes death or serious physical injury to another person refuses the request of a law enforcement officer to submit to a chemical test authorized under AS 28.33.031(a)(2) or AS 28.35.031(g), after being advised by the officer that the refusal will result in the denial or revocation of the driver's license, privilege to drive, or privilege to obtain a license, that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating a motor vehicle or aircraft while under the influence of an alcoholic beverage, inhalant, or controlled substance, and that the refusal is a crime, a chemical test may not be given, except as provided by AS 28.35.035. If a person under arrest for operating a watercraft while under the influence of an alcoholic



beverage, inhalant, or controlled substance refuses the request of a law enforcement officer to submit to a chemical test authorized under AS 28.35.031(a), after being advised by the officer that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating a watercraft while under the influence of an alcoholic beverage, inhalant, or controlled substance, and that the refusal is a crime, a chemical test may not be given, except as provided by AS 28.35.035.

**Alaska R. Evid. 901. Requirement of Authentication or Identification.**

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims, except as provided in paragraphs (a) and (b) below:

(a) Whenever the prosecution in a criminal trial offers (1) real evidence which is of such a nature as not to be readily identifiable, or as to be susceptible to adulteration, contamination, modification, tampering, or other changes in form attributable to accident, carelessness, error or fraud, or (2) testimony describing real evidence of the type set forth in (1) if the information on which the description is based was acquired while the evidence was in the custody or control of the prosecution, the prosecution must first demonstrate as a matter of reasonable certainty that the evidence is at the time of trial or was at the time it was observed properly identified and free of the possible taints identified by this paragraph.

(b) In any case in which real evidence of the kind described in paragraph (a) of this rule is offered, the court may require additional proof before deciding whether to admit or exclude evidence under Rule 403.

**Alaska R. Evid. 902. Self-Authentication.**

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

...

(4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any enactment of the Alaska Legislature or other rule prescribed by the Alaska Supreme Court.

## **STATEMENT OF JURISDICTION**

Mitchel Joseph appeals to this Court from the judgment entered by the Honorable Paul R. Lyle, Fourth Judicial District, at Tok, Alaska, on August 28, 2019, and distributed on September 10, 2019. [R. 211–14] The docketing statement and notice of appeal were filed on September 25, 2019.

This merit appeal is brought as a matter of right in accordance with Alaska Appellate Rule 202. This Court has jurisdiction over this appeal from a final judgment pursuant to AS 22.07.020.

## **ISSUES PRESENTED**

1. When the trial court was presented with evidence that law enforcement misadvised Joseph that his refusal would be a misdemeanor and that he had a right to refuse the test, did the failure to address that misadvisement violate Joseph's right to due process and amount to plain error?
2. Did the trial court violate Joseph's rights to due process and confrontation by prohibiting Joseph from cross-examining on the accuracy of the dates on Joseph's prior judgments for DUI?

## **STANDARDS OF REVIEW**

This court reviews constitutional interpretation issues de novo.<sup>1</sup>

When the admissibility of evidence turns on a question of law, such as the correct scope or interpretation of a rule of evidence, this Court applies its independent judgment, and, under the de novo standard of review, adopts the rule of law that is most persuasive in light of reason, precedent, and policy.<sup>2</sup>

Claims of plain error are reviewed under a four-part test: “(1) there must be error, and the error must not have been the result of an intelligent waiver or a tactical decision not to object; (2) the error must be obvious, meaning that it should have been apparent to any competent judge or lawyer; (3) the error must affect substantial rights, meaning that it must pertain to the fundamental fairness of the proceeding; and (4) the error must be prejudicial.”<sup>3</sup>

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<sup>1</sup> *Sanders v. State*, 364 P.3d 412, 420 (Alaska 2015).

<sup>2</sup> *Id.* at 419–20.

<sup>3</sup> *Hess v. State*, 435 P.3d 876, 880 (Alaska 2018) (citing *Adams v. State*, 261 P.3d 758 (Alaska 2011)).

## **STATEMENT OF THE CASE**

### **A. STATEMENT OF FACTS**

Trooper Anthony Will and Village Public Safety Officer Sadie Warbelow stopped a vehicle for an equipment violation during their return from the Tetlin to Tok. [Tr. 45–46, 102] The driver of the stopped vehicle informed the officers that he had passed a vehicle rollover. [Tr. 45–46, 102] The driver had not seen anybody around the accident scene, so he continued on. [Tr. 103]

The officers responded to the accident and found a black Chevy truck with significant damage. [Tr. 47, 54–58, 105] Trees were laid down around the truck as if it had rolled, but the truck was on its wheels. [Tr. 47, 54–58] The truck was damaged to the point that it was obvious that it was not going to be driven away. [Tr. 105]

The officers slowly drove the road searching for anyone connected to the accident. [Tr. 58–59, 118–19] The officers heard “aggravated yelling,” but could not pinpoint the source, so they began searching on foot. [Tr. 58–59, 118–19] About a tenth of a mile from the accident site, Mitchel Joseph came out of the woods. [Tr. 58–59, 118–19]

Joseph was staggering, but he walked casually towards the officers. [Tr. 60] Joseph said he had picked up a hitchhiker and allowed the hitchhiker to drive so that he could drink. [Tr. 65–66] The hitchhiker wrecked Joseph’s truck

and then left into the woods with Joseph's keys. [Tr. 65–66] Joseph had scrapes on the left side of his face, his shin, and his forearm. [Tr. 61, 123] He also had dirt on his pants and shins. [Tr. 123] The officers noted the standard indicia of impairment, including bloodshot watery eyes, slurred speech, and the odor of alcohol. [Tr. 60, 124]

Joseph said he had been in the woods for forty-five minutes. He asked the officers for a cigarette from the truck. He also asked if he could have a drink. When Trooper Will replied "I don't think you need any more alcohol because I can tell you've already been drinking today," Joseph responded "Well, I ain't done nothing wrong, so." [Tr. 90]

Joseph described the hitchhiker as Native, with hair down to his shoulders, and wearing a black t-shirt and jeans. [Tr. 169] Joseph recalled that the hitchhiker "said his name was John, so. His last name started with D. I can't remember. . . . It might have been Doe." [Tr. 147, 167–68]

The officers did not believe that they observed anything to suggest the presence of another person at the accident scene other than Joseph. [Tr. 66] But the only evidence they examined or seized was an unopened bottle of vodka. [Tr. 58, 195] The officers left a cellular telephone, multiple pairs of shoes, and other items in the truck. [Tr. 195–97] The officers never found Joseph's truck key. [Tr. 69–70] The officers acknowledged that they passed

several vehicles travelling between the traffic stop and the accident site. [Tr. 69]

The officers arrested Joseph, transported him to the Tok trooper station, and attempted to obtain a chemical breathtest sample. [Tr. 170–81] Joseph declined to provide a breath sample on the basis that he was not driving. [Tr. 172–75]

## **B. COURSE OF PROCEEDINGS**

The State charged Joseph with felony DUI,<sup>4</sup> felony refusal,<sup>5</sup> failure to report an accident,<sup>6</sup> importing alcohol into a local option area,<sup>7</sup> and contempt for refusing a search warrant for his blood.<sup>8</sup> [R. 199–205, 223–24, 228–32, 245, 250] The State later dismissed the contempt and importation charges. [R. 217, 223]

Joseph proceeded to trial and presented the defense that he was not driving his truck during the rollover and that the State had otherwise failed to prove its case beyond a reasonable doubt. Upon deliberation, the jury initially reported that it had reached a decision on the refusal and failure to report counts but was unable to reach a unanimous verdict on DUI. [Tr. 304] After

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<sup>4</sup> AS 28.35.030(n).

<sup>5</sup> AS 28.35.032(p).

<sup>6</sup> AS 28.35.080(a).

<sup>7</sup> AS 04.11.499.

<sup>8</sup> AS 09.50.010(5).

further deliberation, the jury returned a guilty verdict on the refusal count and acquittals on the DUI and failure to report counts. [Tr. 320] After the second trial phase on the existence of Joseph's prior convictions, the jury found Joseph guilty of felony refusal. [Tr. 340]

At sentencing, the court found Joseph's proposed mitigating factor under AS 12.55.155(d)(21) and rejected the State's proposed aggravating factors. However, the court did not give Joseph's mitigating factor much, if any, weight. Ultimately, the court sentenced Joseph to 4 years of imprisonment with 1 year suspended and 3 years to serve. [R. 211–15; Tr. 426, 431] The court also imposed a mandatory \$10,000 fine, permanently revoked Joseph's driver's license, forfeited Joseph's interest in his truck, and put Joseph on probation for 3 years following release. [R. 211–15; Tr. 426, 431]

Joseph now appeals.

## **ARGUMENT**

### **A. JOSEPH'S RIGHT TO DUE PROCESS WAS VIOLATED BECAUSE TROOPER WILL MISADVISED HIM THAT REFUSAL WOULD RESULT IN AN ADDITIONAL MISDEMEANOR AND THAT HE HAD A RIGHT TO REFUSE.**

When Joseph declined to provide a breath sample for the Datamaster, Trooper Will advised him that his refusal would be a misdemeanor, but that he had the right to refuse. The trooper's required advisement was erroneous



because Joseph was subject to felony refusal prosecution and because Joseph did not have a right to refuse. The trooper's misadvisement and Joseph's subsequent prosecution and conviction for felony refusal violated Joseph's state and federal rights to due process.

**1. Erroneous advisement of the consequences for refusing a breath test violates due process.**

A person who drives or operates a motor vehicle in Alaska is considered to have given implied consent to a breath test.<sup>9</sup> Because “the decision to refuse a breath test requires careful consideration,”<sup>10</sup> when an arrestee refuses a breath test, “he must be advised of the consequences flowing from his refusal and be permitted to reconsider his refusal in light of that information.”<sup>11</sup> The requirements of that advisement include that the refusal will result in driver's license sanctions, that the refusal may be used against the driver in a civil or criminal action, and that refusal is a crime.<sup>12</sup> If an arrestee is given misinformation or misleading information, “due process concerns can arise” because it can “impair an arrestee's ability to make an informed decision about potential ‘consequences flowing from his refusal . . . .’”<sup>13</sup> This is because the

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<sup>9</sup> AS 28.35.031.

<sup>10</sup> *Olson v. State*, 260 P.3d 1056, 1061 (Alaska 2011).

<sup>11</sup> *Id.* at 1059 (quoting *Copelin v. State*, 659 P.2d 1206, 1212 n.15 (Alaska 1983)); AS 28.35.032.

<sup>12</sup> *Olson*, 260 P.3d at 1061.

<sup>13</sup> *Id.*

decision . . . whether to comply with an arresting officer's request to take a sobriety test is not a simple one,"<sup>14</sup> and "it should not be based on an ignorance of the actual consequences of refusing."<sup>15</sup> Thus, providing an incorrect warning to an arrestee in the context of a breath test refusal implicates the arrestee's due process rights.<sup>16</sup> Additionally, "if it appears that the refusal is based on a confusion about a person's rights, the officer must clearly advise that person that the rights contained in the Miranda warning do not apply to the breathalyzer examination."<sup>17</sup>

**2. Trooper Will misadvised Joseph that refusing to provide a breath sample would result in a misdemeanor and that he had the right to refuse.**

Trooper Will erroneously advised Joseph he would be charged with a misdemeanor if he refused the Datamaster:

I'm going to start this up and it's going to ask for a sample of your breath. If you don't provide it, it's going to be an additional charge of refusal to submit to a chemical test, so it will be an additional misdemeanor.

[Tr. 151] Of course, the State charged Joseph with felony refusal and then convicted him of felony refusal, so the trooper's advisement was erroneous. The trooper also erroneously advised Joseph that he had a right to refuse the test:

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<sup>14</sup> *Copelin*, 659 P.2d at 1213.

<sup>15</sup> *Olson*, 260 P.3d at 1061 (citing *Svedlund v. Anchorage*, 671 P.2d 378, 385 n.9 (Alaska App. 1983)).

<sup>16</sup> *Id.* at 1060.

<sup>17</sup> *Graham v. State*, 633 P.2d 211, 215 (Alaska 1981).

TROOPER WILL: Okay. Let me tell you how it works and then if you still want to decline that's fine.

MR. JOSEPH: I decline.

TROOPER WILL: I know. But I'm just going to tell you how it

works –

MR. JOSEPH: I decline.

TROOPER WILL: -- and then if you don't want to then that's your right.

[Tr. 150]

**3. This error, and the court's and attorneys' failure to recognize it, was plain error.**

The Alaska Supreme Court articulated four factors that must be met before a plain error will be recognized:

(1) there must be error, and the error must not have been the result of an intelligent waiver or a tactical decision not to object; (2) the error must be obvious, meaning that it should have been apparent to any competent judge or lawyer; (3) the error must affect substantial rights, meaning that it must pertain to the fundamental fairness of the proceeding; and (4) the error must be prejudicial.<sup>[18]</sup>

**i. There was error, and it was not the result of tactical decision or intelligent waiver.**

As explained above, allowing Joseph's prosecution and conviction for refusal was error, because Joseph was misadvised of the consequences of that

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<sup>18</sup> *Hess v. State*, 435 P.3d 876, 880 (Alaska 2018) (citing *Adams v. State*, 261 P.3d 758 (Alaska 2011)).

refusal. No intelligent waiver or tactical decision not to object is “plainly obvious from the face of the record,” and should “not presumed in the face of a silent or ambiguous record.”<sup>19</sup>

**ii. The error in this case was obvious and should have been apparent to any competent judge or lawyer.**

*Olson*, the Alaska Supreme Court case that identified the due process concerns implicated by an erroneous advisement, was cited and discussed by two published Court of Appeals decisions and one memorandum opinion in the two years preceding Joseph’s trial.<sup>20</sup> The misadvisement itself was brought squarely to the court’s and parties’ attention when the parties argued about whether the State could present evidence of that misadvisement to the jury through an audio exhibit. [Tr. 149–54].

COURT: And what’s the next objection?

DEFENSE: Exhibit 23. At least when Mr. Chapman and I listened to it, it seemed to include the statement, quote, if you don’t provide it, it’s going to be an additional charge of refusal to submit to a chemical test, so it will be an additional misdemeanor. Clearly, including the level of offense, we would ask the jury not know whether it’s a misdemeanor or a felony. I think that if the jury is told that, oh, this is just a misdemeanor, they may minimize the charge and not give their full consideration to the elements.

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<sup>19</sup> *Moreno v. State*, 341 P.3d 1134, 1146 (Alaska 2015).

<sup>20</sup> *Olson*, 260 P.3d at 1060–61; *Stoner v. State*, 421 P.3d 108, 112 (Alaska App. 2018); *Rask v. State*, 404 P.3d 1236, 1241–42 (Alaska App. 2017); *Duny v. State*, 2018 WL 388613, at \*1 (Alaska App. Jan. 10, 2018) (unpublished).

PROSECUTOR: I'm actually really surprised at that because typically defense don't want a statement saying it's going to be a felony. . . .

[Tr. 149] The court then listened to the audio recording of the trooper's misadvisement:

COURT: All right. And so can I hear it, please?

PROSECUTOR: Yes.

(Audio played as follows:)

TROOPER WILL: All right. So I'm going to go ahead and start this up behind you. It's going to do its start-up process. I'm going to go sample your breath. All right?

MR. JOSEPH: I decline.

TROOPER WILL: Okay. Let me tell you how it works and then if you still want to decline that's fine.

MR. JOSEPH: I decline.

TROOPER WILL: I know. But I'm just going to tell you how it

works –

MR. JOSEPH: I decline.

TROOPER WILL: -- and then if you don't want to then that's your right.

MR. JOSEPH: I want a blood draw.

TROOPER WILL: Okay. So –

MR. JOSEPH: FMH.

TROOPER WILL: Okay. FMH. That's a little far for us. We can't do that here. So –

MR. JOSEPH: (Indiscernible).

TROOPER WILL: -- I'm going to start this up and it's going to ask for a sample of your breath. If you don't provide it, it's going to be an additional charge of refusal to submit to a chemical test, so it will be an additional misdemeanor.

[Tr. 150–51] Joseph then argued that the jury could not properly consider the level of the offense and that the advisement was inaccurate:

Judge, I think if the jury -- the jury certainly cannot, per your instructions, consider the level of the offense. And so, one, having the jury told what the level of offense would be not relevant. Two, it's inaccurate because he's not -- at least the indictment is not for a misdemeanor, it's for a felony. Three, I think that there is a likelihood or a chance that the jury would minimize the level of the offense when considering the elements and not give their full consideration to the elements.

Tr. 151–52] The court then questioned why the State needed to present evidence that Trooper Will advised Joseph that refusal would be a misdemeanor and ruled that the offense level was not relevant:

COURT: So do you need to have the misdemeanor information in? The officer is on the tape is saying if you refuse it will be another charge.

PROSECUTOR: The reason I –

COURT: And then there's a stop. He stops momentarily and he says it will be another misdemeanor. Why do you need that in there to prove your case?

PROSECUTOR: The reason that stayed in is because of the statements that came in simultaneously from

the defendant which is, well, I don't refuse, I just want to go to FMH and –

COURT: Well, he's already said that on the tape before the misdemeanor is stated.

...

COURT: Okay. All right. It's not relevant whether a misdemeanor or not, so I'm going to have you stop the tape before he says it will be another misdemeanor.

[Tr. 153–54]

Accordingly, the fact that Trooper Will misadvised Joseph about the consequences of his refusal was obvious: the parties argued about the misadvisement, the court listened to audio of the misadvisement, and then the court made a ruling about the evidence containing the misadvisement.

**iii. The error in this case affected substantial rights and was prejudicial.**

The erroneous advisement violated Joseph's due process rights.<sup>21</sup> "A constitutional violation will always affect substantial rights and will be prejudicial unless the State proves that it was harmless beyond a reasonable doubt."<sup>22</sup> Moreover, the prejudice is clear: the remedy for the erroneous advisement would have either been suppression of the refusal or a bar to prosecution of the refusal charge on due process grounds.

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<sup>21</sup> *Olson*, 260 P.3d at 1060–61; *Rask*, 404 P.3d at 1241–42.

<sup>22</sup> *Id.* at 881 (quoting *Adams*, 261 P.3d at 773).

**B. THE TRIAL COURT VIOLATED JOSEPH’S RIGHTS TO DUE PROCESS AND CONFRONTATION BY PROHIBITING CROSS-EXAMINATION ABOUT THE ACCURACY OF JOSEPH’S PRIOR JUDGMENTS.**

In the second-phase of Joseph’s bifurcated trial, the State was required to prove that Joseph had been previously convicted for DUI or refusal two or more times in the 10 years preceding his offense.<sup>23</sup> [Tr. 327–32] But when Joseph sought to cross-examine on the accuracy of his prior judgments, the Court ruled that the document’s authentication prohibited any challenge to their accuracy. [Tr. 327–32] This prohibition infringed upon Joseph’s right to confrontation and his due process right to present a defense.

**1. The right to cross-examination and confrontation is guaranteed by the state and federal constitutions.**

The right to confront one’s accusers is guaranteed by both the United States and Alaska constitutions.<sup>24</sup> Cross-examination “is the vehicle by which the credibility of adverse witnesses is tested,” and “[t]he right of cross-examination has been described ‘. . . as beyond any doubt the greatest legal

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<sup>23</sup> U.S. Const. amends. V, XIV; AS 28.35.030(n); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”); *Allison v. State*, 448 P.3d 266, 273 (Alaska App. 2019) (“But the State bore the burden of proving Allison’s guilt beyond a reasonable doubt; it was not Allison’s burden to prove his innocence.”).

<sup>24</sup> U.S. Const. amend. VI; Alaska Const. art. I, § 11.



engine ever invented for the discovery of truth.”<sup>25</sup> “[C]ross-examination of a witness is a matter of right,”<sup>26</sup> and “[i]t is the essence of a fair trial that reasonable latitude be given the cross-examiner . . . .”<sup>27</sup> Infringing upon cross-examination infringes upon the right to fair trial, which in turn infringes upon the right to due process.<sup>28</sup>

## **2. Due process guarantees the right to present a defense.**

“Although it is not absolute, a defendant’s right to present a defense is a fundamental element of due process.”<sup>29</sup> The right to present a defense includes both the right to present evidence and the right to present argument.<sup>30</sup> “Evidentiary rulings can so infringe this right to present a defense that they constitute a violation of the guarantee of our constitution’s due process clause,” and “an incorrect application of the evidence rules [may] encroach[] on this right.”<sup>31</sup>

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<sup>25</sup> *Evans v. State*, 550 P.2d 830, 836 (Alaska 1976) (quoting 5 J. Wigmore, *Evidence* § 1367, at 32 (Chadbourn rev. 1974)).

<sup>26</sup> *Alford v. United States*, 282 U.S. 687, 692, 51 S. Ct. 218, 75 L. Ed. 624 (1931).

<sup>27</sup> *Id.*; *Lauderdale v. State*, 548 P.2d 376, 381 (Alaska 1976) (quoting *Alford*, 282 U.S. at 687).

<sup>28</sup> *Lauderdale*, 548 P.2d at 381.

<sup>29</sup> *C.D. v. State*, 458 P.3d 81, 86 (Alaska 2020) (citing Alaska Const. art. I, § 7) (quoting *Sanders v. State*, 364 P.3d 412, 422 (Alaska 2015)).

<sup>30</sup> *Smithart v. State*, 988 P.2d 583, 586–89 (Alaska 1999) (holding that court abused its discretion and violated Smithart’s due process rights to present a defense by excluding evidence and argument related to an alternate suspect).

<sup>31</sup> *Sanders*, 364 P.3d at 422.

**3. The trial court erroneously prohibited Joseph from challenging the accuracy of the judgments based on its incorrect understanding of Evidence Rule 901.**

The State presented, and the trial court admitted, two certified judgments of Joseph's prior convictions for DUI. [R. 354–60; Tr. 232] Joseph did not oppose the admission of the judgments and stipulated to their authenticity. [Tr. 323, 329–30] However, Joseph sought to cross-examine Trooper Will about the accuracy of the dates on the judgments. [Tr. 327–31] The trial court denied Joseph's inquiry on the basis that Joseph agreed that the judgments were authentic, and that "[i]t's a certified judgment," "[t]he judgment speaks for itself," and "the burden is for you to present some evidence . . . that this is not credible evidence." [Tr. 328–31]

As Joseph argued, however, his agreement that the judgments were authentic only related the documents' admissibility. [Tr. 329–30] As Joseph explained, in agreeing to this foundational requirement, he was not stipulating to the accuracy or veracity of the information contained on the documents. [Tr. 328–39]

Joseph's argument is consistent with the Alaska Rules of Evidence. Article 9 of the Evidence Rules pertains to documentary evidence. Evidence Rule 901 provides that authentication is a condition precedent to admission:

**Rule 901. Requirement of Authentication or Identification.**

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims, except as provided in paragraphs (a) and (b) below . . . .

Rule 902 subsequently provides that “[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required” for certain documents, including certified copies of certain public records.<sup>32</sup> Neither rule provides that the accuracy of documents is not subject to challenge once the foundational requirement of authentication is met.

Of course, all evidence is subject to satisfaction of foundational requirements. For example, relevance is often considered the foundational principle of evidence law and is viewed as “the ‘general theory’ of admissibility of evidence” where “relevance is a sufficient condition for the admission of evidence, requiring that all evidence with any probative value, however slight, be admitted unless some specific exclusionary rule provides otherwise.”<sup>33</sup> As another example, Evidence Rule 104 presents foundational “preliminary questions” to evaluate the general admissibility of evidence. But being foundationally admissible under these rules does not make the admitted

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<sup>32</sup> Alaska R. Evid. 902(4).

<sup>33</sup> David S. Schwartz, *A Foundation Theory of Evidence*, 100 Geo. L.J. 95, 97 (2011) (internal quotations omitted) (quoting 1 J. Wigmore, *Evidence in Trials at Common Law* § 14.1, at 714 (Peter Tillers rev., 1983)).

evidence unassailable or not subject to cross-examination. A contrary rule would subvert or distort our entire adversarial trial system of justice.

Just as Joseph could question the accuracy of other foundationally admissible evidence and testimony presented at his trial, Joseph was entitled to cross-examine on, and challenge the accuracy of, the information contained in the foundationally admissible judgments.

**4. The court's requirement that Joseph produce some evidence that the judgments were inaccurate before he could cross-examine on their accuracy shifted the burden of proof to Joseph.**

The court ruled that Joseph could not challenge the accuracy of the information contained in the judgments without first presenting some evidence that the judgments were inaccurate:

COURT: Well, the burden is for you to present some evidence (indiscernible) that this is not credible evidence. It is outside the 10-year period. You have (indiscernible) some evidence (indiscernible) beyond a reasonable doubt (indiscernible). Do you have any such evidence you're going to present?

DEFENSE: Do not.

COURT: Then I don't see how this (indiscernible). The objection (indiscernible). The judgments . . . .

DEFENSE: I understand the Court's ruling.

COURT: Okay. All right

(End of bench conference)

COURT: The objection is sustained.

DEFENSE: No further questions.

COURT: Do you have anything else?

DEFENSE: No.

[Tr. 331–32]

But as Joseph argued, the State bore the burden of proving every fact necessary to constitute the crime beyond a reasonable doubt.<sup>34</sup> [Tr. 331] The due process clauses of the state and federal constitutions guarantee this right, and the burden may not be shifted to a defendant.<sup>35</sup> Furthermore, that the prior convictions occurred within 10 years of tried offense is an element of felony DUI.<sup>36</sup> Thus, the court’s requirement that Joseph produce some evidence challenging the accuracy of the judgments unconstitutionally shifted the burden of proof to Joseph.

**5. The error was constitutional in scope and not harmless beyond a reasonable doubt.**

“A constitutional violation will always affect substantial rights and will be prejudicial unless the State proves that it was harmless beyond a reasonable doubt.”<sup>37</sup> This error affected Joseph’s rights to confrontation and due process

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<sup>34</sup> U.S. Const. amends. V, XIV; *In re Winship*, 397 U.S. at 364; *Allison*, 448 P.3d at 273.

<sup>35</sup> *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)); *Barrett v. State*, 772 P.2d 559, 563 (Alaska App. 1989) (citing *Patterson*).

<sup>36</sup> AS 28.35.030(n).

<sup>37</sup> *Id.* at 881 (quoting *Adams*, 261 P.3d at 773).

regarding an element of his offense.<sup>38</sup> This error affected the State's burden of proof on an element of the offense.<sup>39</sup> The admitted judgments were the only evidence presented on the element of Joseph's prior convictions.<sup>40</sup> Without the judgments, the State would not have proven the element of Joseph's prior convictions. Based on the court's restriction, Joseph was unable to challenge or confront the element of his prior convictions. Accordingly, the court's error regarding the judgments infringed on Joseph's rights to confrontation and due process and requires reversal.

### **CONCLUSION**

The trial court committed plain error by allowing Joseph's prosecution for refusal when he had been misadvised about the consequences of his refusal and the trial court knew that he had been misadvised. The trial court violated Joseph's rights to confrontation and due process by prohibiting Joseph from challenging the accuracy of the sole evidence presented on the existence of his prior offenses. Accordingly, this Court should reverse Joseph's conviction.

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<sup>38</sup> U.S. Const. amends. V, VI, XIV; Alaska Const. art. I, §§ 7, 11.

<sup>39</sup> U.S. Const. amends V, XIV; *In re Winship*, 397 U.S. at 364; *Allison*, 448 P.3d at 273.

<sup>40</sup> AS 28.35.030(n).

DATED at Kingsley, Michigan, this 16th day of February 2021.

**LAW OFFICE OF MICHAEL HOROWITZ**  
**UNDER CONTRACT WITH THE PUBLIC DEFENDER AGENCY**

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